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Supreme Court, U.S.
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JUN 17 1994
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NO. 93-2021

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA,

PETITIONER - APPELLEE,

VS.

CHARLES HANSBROUGH,

RESPONDENT - APPELLANT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELVENTH CIRCUIT

[PROCEEDING UNDER 28 U.S.C. §2254]

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent Hansbrough disagrees with the Petitioners' statement of the issues in this case.

The issue is whether Petitioner State of Alabama dismissed Respondent Hansbrough's direct appeal of his state conviction on the basis of a firmly established, regularly followed, independent and adequate state procedural rule, thereby precluding habeas review on the ground of procedural default. At the threshold of that issue is the question of whether Respondent's dismissal of his oral notice of appeal in order to proceed pro se acted as a bar to his subsequent notice of appeal, filed within forty-two days after denial of his timely-filed post-trial motions, as provided by Alabama Rules of Appellate Procedure Rule 4(b)(1).

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Statutes Cited:

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Alabama Rules of Appellate Procedure, Rule 42.....6

OPINIONS BELOW

The opinion of the Eleventh Circuit is published as Hansbrough v. Latta, 11 F.3d 143 (11th Cir. 1994).

STATEMENT OF PROCEEDINGS BELOW

Although substantially in agreement with the procedural history quoted by Petitioners from the Magistrate Judge's Report and Recommendation (Petition, pages 3-5), Respondent disagrees with Petitioner's further statement to the effect that the Eleventh Circuit "affirm[ed] the district court's finding that Respondent had committed a procedural default" and reversed in spite of it. (Petition, pages 5-6.) The Eleventh Circuit "revers[ed] the district court's denial of Hansbrough's habeas petition on the grounds of procedural default and remand[ed] for consideration on the merits". (Hansbrough, supra at 147. Following is an outline of the events pertinent herein:

Alabama Courts

3/2/90 Jury trial, Jefferson County, Alabama, Circuit Court; guilty verdict.

4/20/90 Sentence Hearing and oral notice of appeal.

5/17/90 Post-trial Motions, including Motion for New Trial-B (which presents federal claims).

5/22/90 Denial of Motions for New Trial A & B (R-14)

6/8/90 Notice of Withdrawal of (Oral) Notice of Appeal (R-14)

6/15/90 Alabama Court of Criminal Appeals' Certificate of Dismissal on Motion of Appellant. (R-14)

7/6/90 Court of Criminal Appeals' Certificate of Pro Se Notice of Appeal filed 6/28/90, pursuant to denial of Motions and noting that previous (oral) notice had been withdrawn because unwanted counsel was appointed. (R-14)

7/18/90 CCA Certificate of Appeal Stricken (R-14).

Federal Courts

7/25/91 Magistrate Judge's Report & Recommendation. (R-15)

9/12/91 District Court's Order adopting R and R. (R-30)

9/17/91 Notice of Appeal. (R-29)

9/27/91 District Court's denial of Motion for Certificate of Probable Cause and Leave to appeal In Forma Pauperis. (R-29).

6/19/92 Eleventh Circuit's grant of application for Certificate and leave to proceed in forma pauperis.

4/13/93 Following submission of briefs by both parties, undersigned counsel appointed to file supplemental brief.

9/22/93 Oral argument to Eleventh Circuit.

1/7/94 Eleventh Circuit reversed district court.

1/28/94-2/25/94 Appellees' (Petitioners') Brief in excess of page limits, corrected Brief filed with Motion to allow out of time; granted.

3/14/94 Petition for Rehearing denied.

3/22/94 January 7 opinion issued as mandate.

(Because there was no hearing on the merits, the statement of the case encompasses the statement of facts.)

SUMMARY OF THE ARGUMENT IN OPPOSITION

The time and manner of perfecting an appeal from a state law conviction are generally matters of state law. A state court cannot, however, thwart review of its actions through the imposition of novel, unprecedented or undisclosed procedural requirements. The Eleventh Circuit correctly determined in the case below that Alabama had no rule which could reasonably be construed as apprising Hansbrough that his actions with regard to his direct appeal in state court might be deemed untimely, or a waiver of his constitutional right to appeal. To the contrary, the plain language of the applicable Alabama rule provided for precisely the procedure he followed.

Respondent's actions did not transgress a "firmly established and regularly followed state procedural rule", thus there is no procedural default precluding habeas review and Hansbrough is entitled to consideration on the merits in federal court.

Petitioners have failed to show any conflict between the Eleventh Circuit opinion and a holding of another circuit, the Alabama Supreme Court, or this Court, nor is there any showing that the Eleventh Circuit departed from the accepted and usual course of judicial proceedings in a manner requiring the exercise of this Court's supervision. The holding below being entirely consistent with Harris v. Reed[1] and other opinions of this Court with respect to procedural default, the instant case presents no important question of federal law in need of resolution. Accordingly, the Petition for Writ of Certiorari should be denied.

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[1]489 U.S.255 (1989).

ARGUMENT

Petitioners have miscast the issue, the situation and the appellate holding in this case. Petitioners persist in referencing Respondent's filing of a second notice of appeal as an effort to reinstate a withdrawn appeal (See, e.g., Petition at 7, 8, 12, 13, 14, 15, 16). These loose characterizations blur or gloss over the fact that a second, distinct notice was filed pursuant to the provisions of A.R.A.P. Rule 4(b)(1), and seem to suggest that, having withdrawn the only notice of appeal to which he was entitled, Respondent then sought to "reinstate" it. That misses the point of the case and misrepresents the state of the procedural law in Alabama. Review is purportedly sought on the ground that "this Court has never decided whether a criminal defendant, who gives a valid notice of appeal within the time allotted by state law, and then voluntarily withdraws the notice of appeal, is constitutionally entitled to have his notice of appeal reinstated." (Petition at 13, emphasis added.)

The issue, rather, is whether his withdrawal of the oral notice of appeal, for reasons consistent with his prior position regarding representation by counsel, barred the Respondent from filing a subsequent notice of appeal as provided by state rules, absent clear law or rule to the contrary.

The Eleventh Circuit ruling and Respondent's position are entirely consistent with Coleman v. Thompson, 501 U.S. 722 (1991), and Brown v. Allen, 344 U.S. 443 (1953), cited by Petitioners. Coleman and Brown were both cases in which counsel for convicted defendants failed to meet clearly stated filing deadlines. The

circumstances in the instant case are quite different. Here, Hansbrough filed an oral notice at the time of sentencing, as permitted by state rules. He also timely filed several post-trial motions, one of which (Motion B) asserted federal claims. Consistent with his position at trial, he expressed a desire to proceed pro se on appeal; despite his repeated requests in this regard, the same counsel to whom Respondent objected at trial was appointed to represent him on appeal. When he discovered that, he withdrew his oral notice of appeal, but filed a written Notice of Appeal more than forty-two days from conviction but well within forty-two days from denial of his post-trial motions, as provided by Alabama Rules of Appellate Procedure, Rule 4(b)(1).

Had Hansbrough filed his written notice forty-three days after denial of his post-trial motion, rather than forty-two days as provided in the rule, his appeal would unquestionably be untimely, and timely notice is jurisdictional in Alabama. In such event, Hansbrough, like Coleman and Brown, would indeed have procedurally defaulted, and, absent a showing of cause and prejudice, would be precluded from habeas review. Indeed, because the errors in the two cases cited were occasioned by counsel, those defendants sought to be excused from the effects of the state rules.

Hansbrough, though, does not seek to be excused from default; unlike the situation in Coleman and Brown, there is no default to excuse, because the Alabama Court of Criminal Appeals' action in dismissing Respondent's appeal was not grounded on an adequate and independent state rule. Coleman v. Thompson, supra; Ford v. Georgia, 498 U.S. 411 (1991); Harris v. Reed, supra. As the

Eleventh Circuit found, and Petitioners have not shown otherwise, no such rule exists. Rather, Hansbrough proceeded under A.R.A.P. Rule 4(b)(1), which provides, in pertinent part:

> Rule 4. Appeal As of Right - When Taken
> (b) Appeals in Criminal Cases.
> (1) Circuit Court. In a criminal case a notice of appeal by the defendant shall be filed with the clerk of the trial court within 42 days (6 weeks) after pronouncement of the sentence, provided that the notice of appeal may be oral, as provided in Rule 3(a)(2)... If a motion in arrest of judgment, motion for new trial, or motion for judgment of acquittal has been filed within 30 days from pronouncement of the sentence, an appeal may be taken within 42 days (6 weeks) after the denial or overruling of the motion.... (Emphasis added.)

A.R.A.P. Rule 42, which provides for voluntary dismissals, says nothing whatever about whether such a dismissal is with or without prejudice. The Court of Criminal Appeals' summary dismissal was also silent on that point.

Petitioners have shown no rule or case holding or even hinting that voluntary dismissal of a notice of appeal in Alabama constitutes a bar to a subsequent appeal filed within the time provided by Rule 4(b)(1). There is a dearth of case law. The few Alabama cases are civil actions, and certainly are not on all fours. They indicate, though, that where an appeal has never been considered on the merits, the effect of a dismissal is the same as if no appeal had been taken, and if the second notice is given within the time allowed there is no valid reason why the new appeal should not be considered. Federal Deposit Insurance Corp. v. Equitable Life Assurance Society of the United States, 289 Ala. 192, 266 So.2d 752 (1972); Wilson v. Wilson, 298 So. 2d 616, 53 Ala. App. 194, cert. denied, 298 So. 2d 622, 292 Ala. 759 (1973). Taken with the plain, unambiguous language of the rule, the cases

flatly contradict Petitioners' position. (We note that the Petitioners have themselves referred to the first notice of appeal as "void ab initio". See, e.g., Appellees' Brief to Eleventh Circuit at page 13.) The action of the Court of Criminal Appeals was completely without precedent, as well as contradictory to the plain language of Rule 4(b)(1). A requirement of which Respondent could not reasonably be deemed to have been apprised cannot deprive him of his constitutionally guaranteed right to a direct appeal. Coleman, supra; Ford, supra; Harris, supra; Naacp v. Alabama ex. rel. Flowers, 377 U.S. 288 (1963).

For the first time in the more than three years of this litigation, Petitioners accuse Hansbrough of withdrawing his oral notice for "devious, tactical reasons" and suggest that his desire to represent himself is a "factor that should weigh against him..." (Petition, pages 8, 12.) There was nothing devious about Respondent's motive; as stated by Petitioners (and never disputed) it was to avoid representation by unwanted counsel. (Petition at 12.) While the wisdom or otherwise of Hansbrough's rejection of representation by an experienced and well-regarded attorney could be debated, it was not devious. Petitioners do not clarify what tactical advantage non-representation might have conferred upon Respondent, or why or in what manner his desire should weigh against him. In any event, Hansbrough's actions were consistent from an early point in the state court trial process, and, wise or not, he did have the right to proceed without counsel.

Finally, Petitioners insist that the holding of the Eleventh Circuit is inconsistent with this Court's prior rulings "which

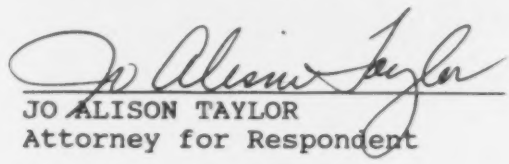
clearly require that a state court's application of a procedural rule be inconsistently applied [sic] before a federal habeas court can disregard the procedural default and entertain habeas claims". (Petition at 10.) That statement of this Court's prior rulings is inaccurate in its incompleteness, and by implication also distorts the situation and the issue. In any event, neither the Alabama Court of Criminal Appeals nor Petitioners have cited any rule at all, consistently applied or otherwise, to support its contentions. Rule 4(b)(1) expressly provided for exactly the procedure Respondent followed. Thus, there is no preclusive procedural default to "disregard". We also note that in the same paragraph in which Petitioners contend the Eleventh Circuit erred in finding the state court's ruling "novel" and "arbitrary" is found the statement that the Alabama Court of Criminal Appeals "[n]ever had to make this ruling in any other case". (Petition at 10.)

CONCLUSION

The Eleventh Circuit correctly applied Coleman v. Thompson, supra, Ford v. Georgia, supra, and Harris v. Reed, supra, to the case at bar. There was nothing in Alabama's appellate or criminal rules that could reasonably have apprised Respondent that withdrawing his oral notice of appeal for clearly-expressed reasons valid to him, and filing a written notice within forty-two days of the denial of his post-trial motions, might be deemed untimely or constitute a waiver of his right to appeal. Pursuant to this Court's directives on the issue of procedural default, there was no preclusive procedural default in this case and Hansbrough is entitled to consideration on the merits in the federal courts.

The Petition for Writ of Certiorari fails to meet any of the criteria for consideration by this Court. The decision below was appropriate and correct and the Petition is due to be denied.

Respectfully submitted,



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June 17, 1994

Honorable William Suter, Clerk
United States Supreme Court
One First Street, NE
Washington, D.C. 20543

Re: State of Alabama vs. Charles Hansbrough
No. _____

Dear Mr. Suter:

Enclosed please find the original of my Brief in Opposition to Petition for Certiorari to the Eleventh Circuit Court of Appeals, together with my Certificate of Service therefor, and a Motion to Proceed in Forma Pauperis. It is my understanding that the one copy suffices when filed on behalf of an indigent. As indicated in my Motion, I was appointed under the C.J.A. by the Court of Appeals to represent Mr. Hansbrough.

Please let me know if anything further or different in required in this connection.

Very truly yours,

Jo Alison Taylor

JAT/gc

Copy: Hon. James B. Prude
Mr. Charles Hansbrough

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